

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

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In Re:

PG&E CORPORATION AND PACIFIC
GAS AND ELECTRIC COMPANY

Debtor.

) Case No. 19-30088
) Chapter 11
)
) San Francisco, California
) Tuesday, August 10, 2021
) 11:00 AM
)

REORGANIZED DEBTORS'
OBJECTION TO CONSOLIDATED
EDISON DEVELOPMENT, INC.'S
AMENDED CURE PAYMENT CLAIM
DEMAND FILED BY PG&E
CORPORATION [10613]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES (All present by video or telephone):

For the Reorganized THEODORE E. TSEKERIDES, ESQ.
Debtors: Weil, Gotshal & Manges LLP767 Fifth Avenue
New York, NY 10153
(212) 310-8000For Consolidated Edison HUGH M. MCDONALD, ESQ.
Development, Inc.: Pillsbury Winthrop Shaw Pittman
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PG&E Corporation and Pacific Gas and Electric Company

1 SAN FRANCISCO, CALIFORNIA, TUESDAY, AUGUST 10, 2021, 11:00 AM

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3 (Call to order of the Court.)

4 THE CLERK: Calling the matter of PG&E Corporation.

5 | Bringing in Mr. McDonald. Mr. Tsekerides.

6 THE COURT: All right. Good morning. Mr. McDonald,
7 state your appearance, please. You got your mic on mute.

8 MR. MCDONALD: Good morning, Your Honor. Hugh
9 McDonald, Pillsbury Winthrop Shaw Pittman, for Consolidated
10 Edison Development.

11 THE COURT: Thank you.

12 Mr. Tsekerides, good morning.

13 MR. TSEKERIDES: Good morning, Your Honor. Ted
14 Tsekerides from Weil Gotshal on behalf of the reorganized
15 debtors.

16 THE COURT: So just to give you a heads-up, we seem to
17 have a little bit of a connection problem. I did a last-minute
18 switch. But if I freeze, don't take it personally.

19 MR. TSEKERIDES: Okay.

20 THE COURT: All right. So, Mr. Tsekerides, you're up
21 first. Of course, I've got a couple questions for you.

22 MR. TSEKERIDES: Okay.

23 THE COURT: Well, the first one, it's a small point,
24 but did the -- the post-petition interest component of about
25 170,000. is that still an issue, or is that no longer an issue?

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1 MR. TSEKERIDES: No, Your Honor. That's not an issue.

2 THE COURT: That's not an issue? It was originally in
3 the demand. And then --

4 MR. TSEKERIDES: Right. And we had noted in our
5 papers that we had taken care of that separately so that the
6 only issue here would be these fees and the -- attorneys' fees
7 and the default interest.

8 THE COURT: Well, I thought -- yes. I thought that
9 was the case. But I just -- I don't know, a little bit
10 unclear.

11 And then from the materials that you submitted, I had
12 the consent and the demand and the examples of a couple of the
13 operating agreements. But I don't have anything from your side
14 and maybe not Mr. McDonald's side -- I don't have any financing
15 agreement itself in the record, do I?

16 MR. TSEKERIDES: There should be financing agreements
17 that were attached to the demand, I believe.

18 THE COURT: Well, it's in the -- the binder that you
19 prepared had five items. There was the cure demand and the
20 original cure demand and a representative agreement and consent
21 and notice of default. Now, are you saying that the
22 representative CED agreement also includes the financing
23 agreement?

24 MR. TSEKERIDES: I'm not making that representation,
25 Your Honor. I don't have in front of me what you have.

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1 I would say that, at the end of the day, it's not
2 really relevant to our argument. But to the extent that you
3 don't have that and you think you need it, I guess we can make
4 arrangements. But we're not really relying on -- in fact, I
5 think our arguments are quite to the contrary, that the
6 financing agreements aren't relevant. And to the extent they
7 are, it's all still based on a breach of an ipso facto clause
8 that we filed for bankruptcy.

9 THE COURT: Well, I understand that. But, Mr.
10 McDonald, you believe that I have a financing agreement in the
11 record somewhere or (audio interference)?

12 MR. MCDONALD: No, Your Honor. I don't believe we do.

13 THE COURT: Well, here's the problem I have. And, Mr.
14 Tsekerides, I know you'd like to kind of isolate the issue. I
15 don't know how I can make an informed decision here without
16 knowing what the so-called cross-default provisions say. I
17 mean, I can presume what they say. And your opening brief kind
18 of says, oh, we got this cross-default, and that doesn't apply.
19 And then you were dismissive in the opposition saying, well,
20 that's not relevant. How can I -- I mean, it seems to me I'm
21 almost making a decision in the abstract if I don't have -- if
22 I don't think about the cross.

23 MR. TSEKERIDES: Well, I don't think so, Your Honor.

24 THE COURT: I mean, to the -- one more point.

25 MR. TSEKERIDES: Yeah, I'm sorry. Yeah.

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1 THE COURT: For example, again, I don't want to turn
2 this into a criticism, but your reply didn't mention the Copple
3 (ph.) case or that other case that has an unpronounceable name.

4 MR. TSEKERIDES: With --

5 MR. MCDONALD: (Indiscernible).

6 MR. TSEKERIDES: With the L.

7 MR. MCDONALD: (Indiscernible).

8 THE COURT: Yeah. And yeah. There was an example of
9 cross-default provisions honored or not honored. And how -- so
10 how can I make a decision here without knowing the whole story?
11 Although I can guess that the financing agreement has some
12 boiler-plate bankruptcy clause provision like the underlying
13 CED agreements.

14 MR. TSEKERIDES: If I might, Your Honor. I think --
15 and I think the confusion comes from the point that we are not
16 claiming that these are your traditional cross-defaults. But
17 because -- in other words, we're not saying that we had an
18 agreement with somebody else, and when we breached that, it
19 automatically breaches something else. But because ConEd had
20 raised the point that their damages supposedly arose because
21 they are under an alleged default under their contracts with
22 somebody else, that's why we referenced those. The Copple case
23 and the other case that it's hard to pronounce are not relevant
24 for the simple reason that, 1, they're not -- they're not
25 cross-default issues that we're arguing that should be

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1 applicable. We reference cross-default because they said
2 that -- in their demand that, because we filed for bankruptcy
3 and under our contracts we were in default, that caused them to
4 be in default under their contracts. And we said it doesn't
5 matter which contracts you're claiming under. At the end of
6 the day, I only have a contract with you. And if your damages
7 arose because my filing for bankruptcy breached our contract
8 and that led to something else with you and a third party
9 because we filed for bankruptcy, it's still an ipso facto.

10 THE COURT: But I think in the Copple case --
11 admittedly, it was a long time ago and not binding on
12 anything, but it was a very integrated relationships between,
13 as I recall, it was a veterinarian and the seller, the seller
14 and the buyer and the landlord, right? But everything was very
15 much woven together. You can't pretend that the agreements
16 here are complete strangers to one another. Everybody knows --

17 MR. TSEKERIDES: Right. But, Your Honor, in fairness
18 to us, we never said we were complete strangers to them.

19 THE COURT: Right.

20 MR. TSEKERIDES: In fact -- we've never said that. In
21 fact, in our opening brief two years ago when we filed the PI
22 to stop FERC --

23 THE COURT: Right.

24 MR. TSEKERIDES: -- we acknowledged as much. But the
25 Copple case --

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1 THE COURT: I know that.

2 MR. TSEKERIDES: -- does not -- does not deal with
3 ipso facto clauses. I mean, we're talking about a situation
4 here -- and frankly, I think 365(b) (2) should really put to
5 rest whatever we're talking about here, that --

6 THE COURT: Let me stop you there.

7 MR. TSEKERIDES: Yeah.

8 THE COURT: You may win on that, and that may be the
9 end of the story. But the point is, I've got a lot of money
10 spent and a lot of good lawyers on both sides giving me a lot
11 of argument. And wait a minute, what am I supposed to be
12 focusing on here?

13 MR. TSEKERIDES: Well, we would argue that you don't
14 need to be focusing. And I'm happy to let Mr. McDonald argue
15 when it's his turn that you need to. But our point is you
16 don't need to be focusing on the finance agreement's terms in
17 order to rule in our favor because, at the end of the day, and
18 I have a letter from one of the counterparties here that I
19 believe is in the record because it's attached to one of our
20 exhibits, that they acknowledge under that other contract that
21 we're not a party to -- we're not saying we're strangers, but
22 we're certainly not a party to those financing agreements, that
23 they said it was in each account in each case on account of the
24 bankruptcy filing.

25 So our point is, look, whatever you're arguing about,

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1 at the end of the day, you're saying you're entitled to twelve
2 million dollars because we filed for bankruptcy. And our point
3 is --

4 THE COURT: Exactly.

5 MR. TSEKERIDES: -- that's a quintessential ipso facto
6 clause that's unenforceable.

7 THE COURT: No. I understand your point. And I'm
8 going to --

9 MR. TSEKERIDES: Okay.

10 THE COURT: -- shut up in a minute. I have a couple
11 more --

12 MR. TSEKERIDES: Okay.

13 THE COURT: -- preliminary questions. But I do think
14 in the binder that you gave me, there is an Exhibit E. And
15 again, I have to be careful because some of these things are
16 redacted and some are not. But Exhibit E is a notice of
17 default by a financer. And --

18 MR. TSEKERIDES: Right.

19 THE COURT: Sure, as I said, I don't want to act like
20 I was born yesterday either. I know what that thing probably
21 says. But the fact is -- I was thinking to myself, well, make
22 a ruling in this case. If there's an appeal, will the
23 appellate court say, well, duh, you don't have a complete
24 record? Okay. Let's --

25 MR. TSEKERIDES: Sure.

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1 THE COURT: Let's go to another question I have about
2 your side. And that -- I think Mr. McDonald argues that the
3 damages are direct. And I guess you're saying they're not
4 direct. Am I correct? I mean, let's not kid ourselves. You
5 know exactly what those financing agreements say and what they
6 don't say. But do you win if I say that whatever ConEd's
7 damages are, they're indirect rather than direct, or does
8 that -- does that --

9 MR. TSEKERIDES: That's really not the -- for this
10 argument, and we set this up at ipso facto, the direct/indirect
11 consequential damages is a completely separate point. For this
12 argument today, whether they're direct, whether they're
13 consequential, whether they're whatever, the fact of the matter
14 is they arose on account of us filing for bankruptcy. And
15 therefore, they are unenforceable under 365(b) (2) .

16 If we were to lose today and you were to say that ipso
17 facto clause is not triggered, which, as I will argue, I think
18 will be -- I think will have repercussions beyond this case.
19 But if that were to happen, then we would come back to you. I
20 don't know if we'd have to take discovery, but we would come
21 back to you and say, okay, these damages, whatever they are,
22 they're not recoverable under their contract because they're
23 not direct damages. And there's a whole other line of case law
24 that deals with that. And there might be some fact issues. We
25 touched upon this, if you recall, when we were thinking about

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2 this. And I think we all agree that, at the end of the day, it
3 was better for today to just focus on the legal point of the
4 ipso facto clause.

5 So for today, I would say it doesn't matter. It's
6 irrelevant whether or not they're direct or consequential
7 because what is relevant is that -- the result as they claim
8 and their finance people claim that they arose because we filed
9 for bankruptcy.

10 And going back to the finance agreements, I'm not
11 sure --

12 THE COURT: Okay.

13 MR. TSEKERIDES: -- we even have those. But we can
14 address that later.

15 MR. MCDONALD: We have produced those to you.

16 MR. TSEKERIDES: Okay.

17 THE COURT: I don't think -- I mean --

18 MR. TSEKERIDES: That's not --

19 THE COURT: But Mr. Tsekerides --

20 MR. TSEKERIDES: But again, that's not relevant for
21 today.

22 THE COURT: On the moment --

23 MR. TSEKERIDES: I'm sorry, Your Honor. I lost you
24 there.

25 THE COURT: The -- no, no. I paused. But maybe my
connection froze too. On the moment of (audio interference) of

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1 January 29th, there were twenty-eight days of payments accrued
2 but not due. But there was a pre-petition component to a
3 portion of the claim. Now, it got picked up in the 503(b)(9),
4 I guess, and part --

5 MR. TSEKERIDES: But we --

6 THE COURT: -- of the cure. But isn't it true on the
7 moment there was at least a financial default that predates the
8 exact petition or not?

9 MR. TSEKERIDES: No. I mean, if there were -- there
10 were amounts accruing, but they were not due. And so when we
11 filed for bankruptcy, the automatic stay applied. And whatever
12 those amounts were, that's not the predicate for this. I mean,
13 all of the notices are clear. These damages they're claiming
14 arose because we filed for bankruptcy. But when we filed for
15 bankruptcy, amounts were not owed yet. They would have been
16 owed, I think, in February.

17 But at the end of the day, we filed for bankruptcy.
18 And under the code, we didn't have to pay those. We did
19 ultimately pay them. And including during the -- we performed
20 during the bankruptcy. Things that were delivered during the
21 bankruptcy were paid. And then if you recall, we made a motion
22 to you in November to pay certain amounts that were still open.
23 But all of that has been paid.

24 At the end of the day, the point for today is that
25 they are claiming these twelve million dollars because we filed

1 PG&E Corporation and Pacific Gas and Electric Company
2 for bankruptcy. And they're claiming our filing for bankruptcy
3 led them to be in default under these finance agreements and
4 apparently accruing obligations under those contracts but all
because we filed for bankruptcy.

5 THE COURT: I think in the -- I understand that. And
6 again, I know the facts.

7 MR. TSEKERIDES: Okay.

8 THE COURT: And I know how the (audio interference)
9 thing operates. But I believe -- I'm just looking here at the
10 preliminary -- the amended cure demand that Mr. McDonald filed.
11 I believe there was a reference at least that there was some
12 pre-petition owing or at least debt lately about owing. There
13 was pre-petition debt --

14 MR. TSEKERIDES: We don't dispute --

15 THE COURT: -- in these -- on the moment of
16 bankruptcy.

17 MR. TSEKERIDES: We don't dispute that amounts were
18 accruing.

19 THE COURT: Right.

20 MR. TSEKERIDES: But those were all paid in part of,
21 like, I would call that almost, like, ordinary cure. You have
22 some amounts owing beforehand pre-petition which, under the
23 code, we don't have to pay while we're in bankruptcy. We paid
24 certain things going forward. There was a motion made in
25 November to allow us to pay other things. And then when the

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1 plan went effective, we paid whatever amounts were owed.
2 Now, if they wanted -- I mean, they make some
3 arguments about forward contracts which I don't think is
4 relevant at this point. But if they had wanted to and they
5 thought the automatic stay did not apply, they could have done
6 something certainly well before they filed some cure demand
7 seventeen months later. If they were really worried about a
8 couple of shekels that were owed for pre-petition amounts, they
9 could have done something rather than sitting around and now
10 claiming, which would be completely different from what they're
11 arguing, that that small piece in January is the reason why
12 we're here.
13 That ship has sailed. We're here because they say we
14 filed for bankruptcy --
15 THE COURT: Well --
16 MR. TSEKERIDES: -- creating a host of other supposed
17 breaches in their finance agreements.
18 THE COURT: Well, as you -- as you've said, we're not
19 here for that reason because that portion of the debt was paid.
20 MR. TSEKERIDES: Correct.
21 THE COURT: In other words, to that twenty-eight-day
22 window of power provided was paid --
23 MR. TSEKERIDES: Correct.
24 THE COURT: -- under the cure.
25 MR. TSEKERIDES: Correct.

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1 THE COURT: Okay. And so -- but now we come back to
2 another provision of the contract. And again, they are
3 different provisions, but they're the indemnity provisions.
4 And I'm a little unclear. But do you think the indemnity
5 provisions are also irrelevant to the argument for today?

6 MR. TSEKERIDES: For today, yes. I think you'll see
7 two things. One --

8 THE COURT: Okay.

9 MR. TSEKERIDES: -- I think you can read their brief.
10 You don't really see much about an indemnity discussion for
11 today. And 2, it all arises out of our filing for bankruptcy.
12 And I can't -- and I know I'm going to sound like a broken
13 record on that. But, I mean, I think when you see -- we cited
14 at least five or six cases that it doesn't make sense that I'm
15 curing the bankruptcy, whatever that means, but that doesn't --
16 I'm excused from curing the bankruptcy but I'm not excused from
17 curing the damages that flow from that.

18 At that rate, like, what's the point then of having
19 that section? It's got to all be inclusive. So, I mean,
20 that's -- I mean, we're sort of --

21 THE COURT: No, I --

22 MR. TSEKERIDES: -- Frankensteining my argument here.

23 THE COURT: -- understand that.

24 MR. TSEKERIDES: But I appreciate that.

25 THE COURT: Well, the Copple case and the Lillaburg

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1 (ph.) --

2 MR. TSEKERIDES: Lillaburg. That's it, Your Honor.

3 THE COURT: If I'm not mistaken, I believe -- I
4 believe both of them -- there are -- certainly, in Copple there
5 were pre-existing defaults. So whereas here, we have no
6 defaults until the petition. And it is only the petition that
7 starts the default. In Copple we already had defaults, right?

8 MR. TSEKERIDES: Well, I think that proves my point
9 that these other cases had defaults beforehand.

10 THE COURT: Yes.

11 MR. TSEKERIDES: But that's not -- I mean, we're here
12 because they're claiming they're entitled to twelve million
13 dollars because we filed for bankruptcy as an event of default.
14 And this isn't just me making it up. Their papers are replete
15 with that. And I think the coda on that is the letter that --
16 I mean, I'm not going to go into the specifics because it was
17 considered highly confidential, but Your Honor has it. And it
18 says what it says, that it's all because we filed for
19 bankruptcy. And, I mean, I know it's simplistic, but I think
20 the argument is clean that the law is clear, the code is clear
21 not just in 365(b) (2). And the reason we cited these other
22 provisions is to show not that we're saying they apply like
23 365(e) or others that we cited, but to show that congress
24 intended for ipso facto clauses not to be applicable. It has
25 certain exceptions under different circumstances, but 365(b) (2)

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1 without exception precludes someone from recovering damages on
2 account of a debtor filing for bankruptcy. And you can't say,
3 well, it only excuses you from curing the bankruptcy, but it
4 doesn't excuse you from paying the damages from the bankruptcy.
5 I mean, if that's the case, then 365(b) (2) doesn't exist
6 because what's the point of telling me, okay, I'm excused from
7 the bankruptcy but everything that flows from that I'm not.

8 And I know Your Honor is a fan of the hypothetical, so
9 let's add a contract that said, if you file for bankruptcy, you
10 owe me ten million dollars in liquidated damages. And assume
11 that it's valid under state law, so there's no question.
12 That's an ipso facto. I file for bankruptcy, you get ten
13 million dollars? You can't do that. That's essentially what
14 we have going on here.

15 THE COURT: I have no more questions. And I gave you
16 a portion of -- a total of thirty minutes. You've got -- let's
17 just use what you want now. And I'll try to balance the time.
18 And you go ahead and say what you want and reserve what you
19 want.

20 MR. TSEKERIDES: Sure. Well, I mean, I'll reserve
21 ten. I mean, I think I've made -- like I said earlier --

22 THE COURT: And I'm just saying you don't have --

23 MR. TSEKERIDES: I mean, sort of through our colloquy,
24 Your Honor --

25 THE COURT: I would say, you don't have to -- you

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1 don't have to if you want.

2 MR. TSEKERIDES: I mean, certainly through our
3 colloquy I think I've make my point. And, I mean, I'll just --
4 I'll just make a few minor points. There's some reference
5 to -- references to 1124 and 502 that ConEd made. But I think
6 if anything, those further solidify our points, because even
7 1124 talks about -- you don't have to cure if it's under
8 365(b)(2). So again, there is no -- there is no separate
9 claim. Their argument basically is, well, there is the claim
10 out there even though you don't have to cure the default.
11 That -- mean, respectfully, that makes zero sense. And 1124
12 supports our reading of 365(b)(2).

13 And then finally, 502, which they point to as the
14 claims provision, well, that actually says unless it's
15 precluded under applicable law. Well, 365(b)(2) is applicable
16 law. You don't have a claim. When I -- when I file for
17 bankruptcy, you don't have a claim for money damages. The code
18 precludes that. So 1124 and 502, which they seem to fall back
19 on, don't help them either. And I've touched on already I
20 think the cross-defaults again. And maybe we sewed some of
21 this confusion. But in fairness to us, again, that arose
22 because they were pointing to some third-parties contract
23 which, again, at the end of the day, it's all predicated on our
24 filing for bankruptcy. And you don't get damages for that.
25 And I'll reserve the balance of my time. And I guess I'll

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1 save, like, ten minutes.

2 THE COURT: Okay. Mr. McDonald, you've got thirty
3 minutes or as much as you want, I mean, up to thirty minutes.

4 MR. MCDONALD: For the record, again, Hugh McDonald,
5 Pillsbury Winthrop --

6 THE COURT: You all right?

7 MR. MCDONALD: -- for the Consolidated Edison
8 Development --

9 THE COURT: I'm going to put -- I'm going to put --
10 hold on a second. I can hear you better if I put my headset
11 on. Okay. Go ahead.

12 MR. TSEKERIDES: Well, we're not -- we're not
13 videotaped, right, Your Honor?

14 THE COURT: Go ahead, Mr. McDonald.

15 MR. TSEKERIDES: People don't see us with our headsets
16 on anyway. So we're okay.

17 MR. MCDONALD: Can you hear me now, Your Honor?

18 THE COURT: No, they can see me with my headset on.

19 MR. MCDONALD: Okay. Your Honor, can you hear me
20 okay?

21 THE COURT: Yes.

22 MR. MCDONALD: Okay.

23 THE COURT: Yes, I can hear you -- am I freezing on
24 you?

25 MR. MCDONALD: You're freezing a little bit. It's a

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1 little choppy, but I can generally hear you.

2 THE COURT: Okay.

3 MR. MCDONALD: Okay.

4 THE COURT: Go ahead.

5 MR. MCDONALD: Your Honor, before I go into the
6 argument, we had filed two declarations in support of our
7 response, the declaration of James Dixon, he is the chief
8 operating officer of ConEd Development, and Frank Linde (ph.)
9 which we offered in the nature of an expert. They are both
10 here, both present in Zoom world, this hearing. So we would
11 like to make an admission of their declaration as part of the
12 evidentiary record.

13 MR. TSEKERIDES: And, Your Honor, we objected to Mr.
14 Linde. We don't -- first of all, we don't see that there's any
15 relevancy whatsoever. And he says that he's providing -- as a
16 factual matter, he has zero personal knowledge of anything
17 relating to this -- to this relationship.

18 And in terms of an expert report, it's really not
19 appropriate in the context of this ipso facto argument what his
20 views may or may not be about how people go about their
21 business buying and selling. One, again, I'll stress he has
22 zero personal knowledge of what PG&E knew or didn't know.

23 And so on the other one, it's a ConEd person. He has
24 facts. We have no issue with that. But on the Linde one, we
25 do object.

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1 THE COURT: I'm going to have to make a ruling on it.
2 I'm going to take it under advisement with the merits of the
3 motion. So, Mr. McDonald, you don't need to bring those
4 gentlemen into the screen and have them sworn. Their
5 declarations are what they are. And Mr. Tsekerides has made
6 the record that he believes at least one of them shouldn't be
7 considered. But I'll just deal with it when I make a ruling on
8 the merits.

9 MR. MCDONALD: I appreciate that, Your Honor.

10 With respect to the Linde declaration, given that PG&E
11 waives the cross-default issue and the -- that their view is
12 having two separate contractual relationships, we felt the need
13 to have Mr. Linde in addition to Mr. Dixon attest to the
14 interrelated nature of these two contracts.

15 THE COURT: No, I understand. I understand your
16 points.

17 MR. MCDONALD: Your Honor, before I get into the ipso
18 facto issues, I just wanted to give Your Honor a little bit of
19 background on the relationship. ConEdison, Consolidated
20 Edison, developed --

21 THE COURT: I've read --

22 MR. MCDONALD: -- (indiscernible). And it --

23 THE COURT: Mr. McDonald, I read all the briefs. I
24 read all the briefs twice. So --

25 MR. MCDONALD: Yeah, okay.

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1 THE COURT: -- you can use the time to give me the
2 background, but I have a bad habit of preparing for these
3 hearings.

4 MR. MCDONALD: I appreciate that, Your Honor. I just
5 wanted to make sure that Your Honor didn't have any questions
6 about the background.

7 And, Your Honor, I want to refer to, ConEdison, I mean
8 Consolidated Edison Development and all of its affiliates.
9 There are sixteen different --

10 THE COURT: Right.

11 MR. MCDONALD: -- affiliates, project entities, that
12 are currently counterparties to agreements with PG&E. When I
13 refer to them, I like -- just ease of reference, I'll be
14 referring to all of them.

15 THE COURT: Okay.

16 MR. MCDONALD: Your Honor, as Your Honor noted, we did
17 submit an initial cure claim demand. That was following
18 negotiation provisions to a confirmation order which enabled
19 energy suppliers to submit cure claims with PG&E, we've had --
20 Your Honor, your hand is up. Your Honor? We extended the
21 period under the confirmation order several times, one with the
22 order of the Court and then by agreement with PG&E.

23 After we submitted our initial cure claim demand, we
24 attempted to reach a resolution out of court or actually a
25 short mediation. Following that, we amended the claim. PG&E

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1 agreed to pay the post-petition interest we had sought. And we
2 also reduced the amounts to be able to confirm the claims.

3 As Mr. Tsekerides noted at our prior conference with
4 the Court, we agreed to focus on the application of the ipso
5 facto clauses to the claim.

6 So, Your Honor, PG&E's position we just heard is that
7 no default, no default can occur because of the ipso facto
8 provisions. We think that's simple law. And in looking at
9 this, Your Honor, I think you have to consider four things:
10 The first is the purpose of the ipso facto provisions, the
11 legislative history of these provisions, the interrelationship
12 of the agreements at issue, and the (indiscernible) aspect of
13 (indiscernible).

14 Your Honor, ipso facto means generally by the act
15 itself. In most agreements, whether it's a purchase agreement,
16 a loan agreement, all have provisions even today that say it is
17 a default if a party files for bankruptcy. Under the prior law
18 under the Bankruptcy Act -- and I -- not quite to a point where
19 I actually practice under the act, Your Honor, but I did have a
20 case under the act in the beginning of my career. It
21 requires --

22 THE COURT: I did practice under the act, including
23 some ipso facto cases. So I've been there and done that.

24 MR. MCDONALD: So the prior act had no provisions
25 relating to ipso facto provisions. And what that meant was,

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1 when the company filed for bankruptcy, the counterparty could
2 potentially terminate the contract or, if they wanted to
3 reorganize, they could object to the assumption of a contract
4 as part of the reorganization. There was a -- there was view
5 that that would frustrate reorganizations if people would lose
6 their contractual rights simply because of the bankruptcy
7 filing.

15 But in each instance, Your Honor, it is the filing of
16 bankruptcy, that default that congress excused, it's as if
17 congress is saying -- said you can't unring the bell, right?
18 You can't stop the fact of -- or overlook the fact that the
19 bankruptcy default occurred.

25 The legislative issue that is quoted, Your Honor, I

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1 think is actually very important on this because I think it
2 hits the point right on. Congress said these clauses protected
3 under present law automatically terminate the contract or lease
4 or permit the other contractual party to terminate the contract
5 or lease in the event of bankruptcy. This frequently hampers
6 rehabilitation efforts. The trustee may assume or assign the
7 contract under the limitations imposed by the remainder of this
8 section, then the contract or lease may be utilized to assist
9 in the debtor's rehabilitation or liquidation.

10 The unenforceability of ipso facto bankruptcy clauses
11 proposed under this section will require the courts to be
12 sensitive to the rights of the nondebtor party to the executory
13 contracts and unexpired leases. If the trustee is to assume a
14 contract or lease, the courts will have to ensure that the
15 trustee's performance under the contract or lease gives the
16 other party the full benefit of his bargain. And that's what
17 we're seeking here, Your Honor, to be able to claim the full
18 benefit of our bargain.

19 Your Honor, the agreements that are at issue here are
20 very much interrelated. You can't have --

21 THE COURT: Well, hold on. Mr. McDonald, if there are
22 no consequences, what's the point of the having it in there?
23 If congress says --

24 MR. MCDONALD: Because, Your Honor, the --

25 THE COURT: -- you can file bankruptcy even though

1 PG&E Corporation and Pacific Gas and Electric Company
2 someone (audio interference) bankruptcy, they decided that
3 that's the end of the story, there's no other consequence?

4 MR. MCDONALD: The limitation, Your Honor --

5 THE COURT: I mean, what -- well, what consequence
6 follows beyond the filing of a bankruptcy if your argument is
7 correct?

8 MR. MCDONALD: Sorry, Your Honor. You broke up in the
9 first part of that sentence.

10 THE COURT: I said what consequences follows the
11 bankruptcy if the only thing that congress nullifies is the
12 fact that you filed bankruptcy and you didn't? So, I mean,
13 your argument would be congress says you can pretend you didn't
14 file bankruptcy if you did, but there are no other
15 consequences. Well, what does that mean?

16 MR. MCDONALD: Well, originally, Your Honor, under the
17 act, the estate couldn't prevent it from assuming the contract
18 because it's an incurable default. You can't literally unring
19 that bell.

20 THE COURT: Right.

21 MR. MCDONALD: And that was --

22 THE COURT: That's 541. But that's 541, before you
23 ever get to the executory contract. I mean, you could have --
24 you could be forfeiting rights even if you didn't have any
25 executory contracts. But 541 protects the debtor in the
bankruptcy there. But here this debtor chose to preserve the

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1 contracts. And you're saying you can preserve the contract but
2 not the provision that congress accepted from 365.

3 MR. MCDONALD: Your Honor, what congress was
4 addressing in 365(b) and the corresponding sections 1124 was
5 the inability of the estate to assume a contract because of the
6 incurable default of the bankruptcy and/or the financial
7 condition of the counterparty, both of which would prohibit or
8 potentially prohibit the estate from assuming the contract.
9 And that is -- that is a default. It's full stop a default,
10 but it's an incurable default. And that's what congress is
11 struggling with when they were introducing the code in 1978.
12 They believed that if there is an incurable default, as
13 others -- there are other uncurable defaults, the estate would
14 be prohibited from realizing the benefits of the contract.

15 And Your Honor is correct. 541 -- and I would argue
16 362 also would apply when there was a filing. 362 would
17 prevent any action by the counterparty to take -- to go against
18 property of the estate, just to take your 541 question a little
19 further.

20 Your Honor, you're frozen. Can you still hear me?
21 Your Honor?

22 THE COURT: Yes, I can. I'm sorry I'm having -- look,
23 I'm going to -- I'm going to try to make another fix on the
24 connection here. Just take a second here. Wait for me. This
25 is very frustrating. I'm sorry it's happening.

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1 Okay. Can you hear me now, Mr. McDonald?

2 MR. MCDONALD: I can hear you now. You're a little
3 choppy on the video, but I can hear the audio fine. Did you
4 hear what I just --

5 THE COURT: Yeah.

6 MR. MCDONALD: Did you --

7 THE COURT: Yeah, I can -- I can hear you. I don't
8 know why this is happening. I don't have any other programs
9 running. And I've switched my connection. So I apologize for
10 the mix-up. I thought we had it fixed by now. Go ahead.

11 Well, I want to ask you some questions. So, but, I
12 mean, you're focusing on -- but what -- the fact that you give
13 me this history, I grant you the history and I grant you what
14 it came from. But what does the parenthetical and the
15 provisions in 365(b)(1) mean if it says -- if there's
16 exceptions, what doesn't have to be cured?

17 MR. MCDONALD: You're talking about 365(b)(1), Your
18 Honor, or (b)(2)?

19 THE COURT: Yes.

20 MR. MCDONALD: (b)(1).

21 THE COURT: Well, (b)(1). I mean, together. I'm
22 talking about them together. I mean, (audio interference)
23 (b)(2), okay? And, I mean, they go together because (2) says
24 (1) doesn't apply, so if (1) doesn't apply for a default that
25 is a breach relating to insolvency. So if the default doesn't

PG&E Corporation and Pacific Gas and Electric Company
1 apply, what do I mean? Whatever the history notwithstanding,
2 how do you get around the plain words of the statute there?

3 MR. MCDONALD: Those aren't the plain words of the
4 statute. What the statute provides, Your Honor, is the breach
5 of contract, right, the default itself which is the
6 commencement of a bankruptcy case, the debtor is relieved of
7 having to cure that. The debtor can't cure that.

8 THE COURT: Okay.

9 MR. MCDONALD: But it goes beyond that, Your Honor,
10 because even if you look at the power purchase agreements as --
11 and Mr. Tsekerides -- we have a difference of opinion on this.
12 But a power purchase agreement is also a forward contract.
13 That's clear from the Clear Peak Energy case we cite and also
14 the National Gas Distributors case out of the Fourth Circuit.
15 Both of those relate to -- one instance to Clear Peak which is
16 TPI. And it was Southern California Edison that sought to
17 terminate the power purchase agreement post-petition. It was
18 given the ability to do so.

19 And in National Gas Distributors, a long-term gas
20 supply content was found to actually be a swap under the swap
21 provisions of the safe harbors. Well, in response, to safe
22 harbor argument, PG&E cites to an unreported decision in which
23 the judge, then Judge Peck, offered a more restrictive
24 interpretation of the scope of the safe harbors. That
25 decision, Your Honor, was specifically rejected by the Second

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1 Circuit years later in a case reported at 970 F.3d 91 at page
2 104, footnote 11.

3 THE COURT: What's the name of that case?

4 MR. MCDONALD: Lehman Brothers, but it was another
5 Lehman decision, Your Honor. And it's from Second Circuit
6 2020. In that case the Second Circuit considered flip
7 provisions and a swap. And this wasn't an attempt to terminate
8 the swap. There was no acceleration or termination being
9 invoked under the safe harbor. But what was at issue is
10 whether or not the payment priority scheme damages could be
11 calculated and applied pursuant to the terms of that safe
12 harbor agreement as part of the coverage of the safe harbor.
13 And in doing so, they specifically rejected Judge Peck's review
14 of the safe harbor and said it's broad enough to include in
15 that situation the subordination of Lehman's payment priority
16 and distribution according to the amended waterfall provisions.
17 And that's at, again, 970 F.3d at 104.

18 When you look at the PPAs at issue here, they are
19 clearly moving forward as we set forth in our brief all
20 requirements of the forward contract. The only thing we did
21 not do is that we did not terminate the contract. But that
22 doesn't mean that the breadth of the safe harbor doesn't
23 protect the damage calculations and the awards that the party
24 would be entitled to in accordance with this Lehman decision.
25 Ultimately, they assumed the PPAs, but that does not excuse the

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1 fact that there was still damages that were outstanding. And
2 as Your Honor knows, 560 of the Bankruptcy Code specifically
3 operates to take away any impact of the ipso facto prohibition.
4 And what -- and it's very important, Your Honor, because it
5 goes back to Your Honor's earlier point about the intended
6 scope.

7 The safe harbors were put in place by congress to
8 protect counterparties to certain types of qualified financial
9 contracts. And that enabled counterparties to terminate
10 depositions, accelerate, apply collateral, calculate damages,
11 notwithstanding the bankruptcy of a debtor counterparty. The
12 ipso facto prohibition in existence is simply the act of
13 bankruptcy itself terminated. But if it was still a default,
14 it's still a breach. The difference between 365(e) and 560 is,
15 under 365(e), a party to a non-safe harbor contract would not
16 be able to exercise their rights simply because of the
17 bankruptcy. Whereas the safe harbors were created to not only
18 enable them to exercise that right, that contractual right, but
19 then to exercise remedies.

20 THE COURT: Notwithstanding the Lehman decision, the
21 fact is that ConEd didn't seek to terminate anything here. In
22 other words, the debtor -- I mean, you didn't --

23 MR. MCDONALD: In Lehman, Your Honor --

24 THE COURT: So you didn't invoke 365(e) or 560, right?
25 You're doing -- you're using it as a defense now to say that we

PG&E Corporation and Pacific Gas and Electric Company
1 could have -- we could have had our rights preserved if we
2 had -- but you really kind of -- it seems to me you're
3 reversing it. You're saying we could have -- we could have
4 gone forward, notwithstanding the automatic stay, and executed
5 the swap, for example. But the fact is your client just
6 enjoyed the benefit of continued performance under the
7 contract.

8 So, I mean, I guess -- I guess what I'm not relying is
9 how 556 or 560 even became operative when ConEd didn't do
10 anything.

11 MR. MCDONALD: Your Honor --

12 THE COURT: Doesn't it have to require the
13 counterparty to do something?

14 MR. MCDONALD: It provides the safe harbor for the --
15 in the Lehman case, Your Honor, it provides a safe harbor for
16 the calculation of damages and the application of any
17 collateral. In the Lehman case, the swap at issue in the
18 Second Circuit which disagreed with the bankruptcy -- the older
19 bankruptcy court opinion. It was already terminated. There
20 was no active termination --

21 THE COURT: But that's the opposite of --

22 MR. MCDONALD: -- (indiscernible) of the default by
23 Lehman itself filing. It was with a non -- I don't know if you
24 remember Lehman, but it was a flurry to get into bankruptcy.
25 Not all of the Lehman entities filed at the same time. And so

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1 when subsequent entities filed into bankruptcy, terminations
2 had already occurred or notices of termination had been served
3 with respect to certain of the swap positions and other safe
4 harbor positions. And then the question was whether or not the
5 safe harbor was broad enough to allow for the calculation of
6 damages and the application of any collateral post-filing of
7 Lehman entities.

8 And Judge Peck said it's only with regard to
9 termination or acceleration. And the Second Circuit explicitly
10 disagreed with that. And so while we did not terminate or
11 exercise our contractual right to terminate, as a counterpoint
12 on a safe harbor contract, we absolutely are entitled to all of
13 the other rights that you have as a counterparty to a forward
14 contract to exercise our rights and calculate damages
15 underneath our contracts and seek to obtain that recovery from
16 the estate. But the very existence, as I said during the -- of
17 the safe harbors themselves, shows the intent with limited
18 application of the ipso facto provisions in the first instance.

19 THE COURT: Okay. I got it.

20 MR. MCDONALD: Your Honor, just a couple points to go
21 back to.

22 With respect to -- you were asking Mr. Tsekerides
23 about his position to default. Yes, there were (indiscernible)
24 defaults. Did we take any action? Well, at the very beginning
25 of the case, Your Honor, we signed an order setting an early

PG&E Corporation and Pacific Gas and Electric Company
1 date by which people had to file 503(b) (9) claims. And we
2 filed a 503(b) (9) claim. But there were other -- so we did
3 receive the full notices. Once PG&E filed for bankruptcy, we
4 were required to report that to our lenders as if they didn't
5 know because it was the headline of every newspaper in North
6 America.

7 THE COURT: All right.

8 MR. MCDONALD: But that was a -- that was the default
9 that precipitated the notices that we received.

10 Other defaults did ensue, but I think they're
11 cumulative of what happened. Post-petition, we were supposed
12 to receive payments for things like renewable energy credits.
13 We didn't. We were supposed to receive payments of network
14 upgrades, reimbursements under our interconnection agreements
15 which were all financed by our financing parties. We didn't
16 receive those. Next --

17 THE COURT: But you did -- you did receive them later.

18 MR. MCDONALD: We -- well, Mr. Tsekerides references a
19 motion that was made in November which was precipitated because
20 a motion is made to Your Honor because the network upgrade
21 reimbursement payments were being collected by PG&E and then
22 not paid pursuant to the agreements.

23 THE COURT: Well, I understand. But they got -- but
24 they got paid.

25 MR. MCDONALD: We didn't -- we didn't receive our

1 PG&E Corporation and Pacific Gas and Electric Company
2 payments until after confirmation, Your Honor.

3 THE COURT: I know. But you're not including them in
4 your cure now. I mean, you've got -- we're here because of
5 three different categories of things that you had to pay your
lenders, right?

6 MR. MCDONALD: We originally -- when we first
7 communicated with PG&E about our cure claims, we had discussed
8 with PG&E the fact that we've had claims underneath our
9 indemnity provisions. But we also hadn't received payment of
10 our network upgrade reimbursements which were very significant.
11 And that filing, Your Honor, in cooperation of Mr. Tsekerides
12 and PG&E, we were able to get that resolved, but it took quite
13 some time.

14 With respect to the payments that were made, the fees
15 that were paid, they weren't paid until after confirmation.
16 ConEd went out to its lenders and sought to try and litigate
17 any issue or tell them you really shouldn't keep charging these
18 because we're through the bankruptcy. And unfortunately, some
19 of the groups did not agree with that. And through a series of
20 negotiations, ConEdison was able to get the amounts reduced
21 that otherwise would have been payable below what would have
22 otherwise been an applicable default interest rate but still
23 chargeable. So we didn't know at the time of confirmation that
24 we were going to owe this money.

25 THE COURT: No. I understand that. But I don't -- I

PG&E Corporation and Pacific Gas and Electric Company
1 don't think Mr. Tsekerides is making an argument there. I
2 mean, the fact that you -- the fact that you negotiated
3 something less than your client's exposure was more than twelve
4 million and the fact that you got it down to twelve means
5 PG&E's liability is no more than that same twelve.

6 So, I mean, I don't know what to make of -- what --
7 the point is, certain things that might be added to your claim
8 have been eliminated by post-petition interest. The
9 509(b) (3) -- I'm sorry, anyway, item and (audio interference).
10 But we have these three remaining ones, the liquidated damages,
11 attorneys' fees, and that other six-million-dollar thing,
12 consolidated, what do you call -- the figure you had to pay.
13 Those are the three things you're asking for.

14 MR. MCDONALD: If the consent --

15 THE COURT: Consent. It should be, yeah.

16 MR. MCDONALD: -- fees and default interest?

17 THE COURT: Yes.

18 MR. MCDONALD: Default interest and the attorneys'
19 fees that were incurred --

20 THE COURT: Yeah.

21 MR. MCDONALD: -- in dealing with those --

22 THE COURT: No. But, Mr. McDonald, I guess what I'm
23 trying to say is, if PG&E had told you to buzz off across the
24 board, you'd be here arguing for the post-petition attorneys'
25 fees and the 509 -- 503(b) (9) claims and the NUR fees. But

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1 those were all paid, so they're not issue.

2 I mean, your theory, your legal theory, is worth -- is
3 worth -- it's easier a winner or a loser. And if it's a
4 winner, it's whatever you're entitled to, period. And the
5 maximum that you're entitled to at the moment is what you're
6 claiming, just under twelve million dollars. I think that --

7 MR. MCDONALD: That is correct, Your Honor. I just
8 wanted -- Your Honor had some questions at the beginning for
9 Mr. Tsekerides. I wanted just the record to be clear, Your
10 Honor to understand just the facts around the relationship and
11 what went on up until the point of payment on some of these
12 claims (indiscernible) to the petition date and also to put
13 into perspective when ConEdison was required to make these
14 payments.

15 THE COURT: Yeah. I understand. I appreciate that.
16 Okay. Do you want to -- anything else?

17 MR. MCDONALD: Unless Your Honor has any questions,
18 I'm done with my argument.

19 THE COURT: Well, thank you. And you've covered it
20 very ably and helpfully.

21 Mr. Tsekerides, I'm looking at my -- I'm looking at
22 your reply brief. I will have Lehman Brothers to the list of
23 cases you didn't mention. So --

24 MR. TSEKERIDES: And I will say, Your Honor, the
25 Lehman Brothers case is a 365(e) case. And I'll address the

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1 point that Mr. McDonald made why the safe harbor argument he
2 just made is irrelevant here. And --

3 THE COURT: Okay.

4 MR. TSEKERIDES: There's a framework in the code. And
5 365(e) and the 556 and the 560 that go with it all relate to
6 liquidation, termination, or acceleration of the contract at
7 issue. 365(e) is a separate provision from 365(b). And in
8 fact, the two safe harbor provisions in the code, 556 and 560,
9 expressly reference 365(3). They don't say anything about
10 365(b) and for good reason, because when you're talking about
11 the safe harbor provision, what's that all about? If somebody
12 files and it's a forward contract, they can get out of it.
13 That's what the code allows. 365(b) is talking about executory
14 contracts.

15 And two points. They didn't address the fact that, if
16 you don't do anything on this forward contract, it essentially
17 becomes just like any other executory contract. And you heard
18 from Mr. McDonald they did nothing at all for seventeen months.
19 So the first point is, it's very nice that they think now when
20 they were trying to come up with an argument to avoid denial of
21 their claim that they thought of Safe Harbor, but it's too
22 late.

23 And number 2, even if you want to talk about Safe
24 Harbor, that deals with 365(e). We're not arguing about that.
25 We're arguing about in the context of when I assume a contract,

PG&E Corporation and Pacific Gas and Electric Company
1 if you're claiming damages because I file for bankruptcy, you
2 don't get those. And the Lehman case doesn't talk about
3 365(b). So the safe harbor argument just does not work here.
4 And I think they put a lot into that. And so whatever the act
5 said before, congress passed the statute that became the
6 Bankruptcy Code. And 365(b) specifically talks about executory
7 contracts when they're defaults. And then 365(b) (2) says you
8 don't have to cure it. And even some of the cases we cited --
9 you know, and there's a list of them -- but one in particular,
10 that convenience case, they said it's not even a default.

11 Now, we're not necessarily going that far. But I
12 think it shows you that some cases say you can't even rely on
13 that as a default. But even putting that aside, if the default
14 is I filed for bankruptcy, 365(b) (2) can't be more clear. You
15 don't get damages for that. And you're not saved by that if
16 it's a forward contract.

17 THE COURT: I mean, a court that said it's not a
18 default, again, it's meaningless if it's just -- those are just
19 words if there's nothing that follows from it, right?

20 MR. TSEKERIDES: Well, a court -- no. But I think --
21 a court is saying -- look, most of the courts that deal with
22 this say it's not the type of default. It's the type of
23 default that you're cured --

24 THE COURT: Right.

25 MR. TSEKERIDES: Let me start again. That you're

PG&E Corporation and Pacific Gas and Electric Company
1 excused from curing. So a court saying that it's not a default
2 is essentially saying the same thing because it's acting as if
3 there was no default in the first place.

4 THE COURT: Well --

5 MR. TSEKERIDES: I think --

6 THE COURT: I know. I know. But it sounds like
7 (indiscernible) because it sounds to me like there are no
8 consequences other than the fact that you filed. You filed,
9 therefore you filed, period.

10 MR. TSEKERIDES: Right.

11 THE COURT: It's not on anything.

12 MR. TSEKERIDES: Well, it's not on anything. But I
13 think if you tie those two together, courts that say it's not a
14 default at all and courts that say -- in the cases we cited,
15 people were trying to recover fees and attorneys' fees and
16 defaults just like ConEd is here. And the court said, no,
17 because those are all to the fact that you filed for
18 bankruptcy.

19 So if you look at it, and I think the code speaks more
20 in terms of you don't have to cure that default -- but I'll go
21 back -- and again, I apologize for sounding like a broken
22 record. But it has -- 365(b) (2) would have no meaning if you
23 could say you're excused from your default of filing for
24 bankruptcy but pay up anyway. And there's really nothing more
25 I think that I could add to that point, Your Honor. We're

PG&E Corporation and Pacific Gas and Electric Company
1 talking about assuming executory contracts. And that's what
2 365(b)(2) speaks to.

3 THE COURT: Okay. Well, again, gentlemen, you put in
4 a lot of time. And these are long briefs. And it'd be nice
5 to -- I'd like to say, okay, I got it. First of all, I
6 apologize for the connection. It looks like it's gotten
7 settled down now.

8 Secondly, I will -- as I said earlier, I'm not going
9 to make a ruling on the question about the testimony because if
10 I -- if I make a ruling on the underlying law, they -- that'll
11 dispose of it. And if I somehow believe that it makes a
12 difference particularly with Mr. Linde, I'll deal with it
13 separately.

14 But I'm going to take the matter under advisement,
15 that'll come as no surprise, just because I want to reflect on
16 what you said and what your brief said and specifically Mr.
17 McDonald's explanation on the forward contracts. I found
18 the -- and I must say because I read the briefs, I found that
19 556, 560, and 365(e) all seem to be an interesting bundle of
20 rights that didn't have any bearing on what we're dealing with
21 today. But Mr. McDonald, I'm going to give you the benefit of
22 thinking about that a little bit further.

23 So unless either of you want to add anything further,
24 I'm just going to thank you and take the matter under
25 advisement.

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1 MR. TSEKERIDES: Okay. Thank you, Your Honor.

2 THE COURT: All right.

3 MR. MCDONALD: Thank you.

4 THE COURT: Okay. Thank you both for your time and
5 work. I appreciate the effort. We'll conclude the hearing.
6 Thank you.

7 MR. MCDONALD: Thank you.

8 (Whereupon these proceedings were concluded)

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1 C E R T I F I C A T I O N
2
34 I, Michael Drake, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.
6
7 
89 /s/ MICHAEL DRAKE, CER-513, CET-513
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15 Date: August 11, 2021
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